February 10, 2020

Vanessa Countryman, Esq.
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms Countryman,

File No. S7-21-19, Investment Adviser Advertisements; Compensation for Solicitations[1]

CompliGlobe Ltd. is pleased to provide the Commission and the SEC Staff with its comments on the proposed amendments to the advertising rule.[2] We commend the Commission and the Staff for their efforts in updating these rules.

Definition of advertisement

We believe that the words "… or on behalf of" in the definition of advertisement (paragraph (e)(1)) should be deleted as this would bring within the ambit of the rule materials prepared by a person other than the investment adviser where that person did not consult the investment adviser or consulted but issued it without the investment adviser's review and approval. No investment adviser should be held responsible for materials that it did not review and compliance clear.

We believe that the words "…or that seeks to obtain or retain one or more investment advisory clients or investors in any *pooled investment vehicle* advised by the investment adviser" may be misconstrued to mean that an investment adviser is soliciting or is involved in the solicitation of prospective investors for a pooled investment vehicle. The Commission and the SEC Staff consider this to be a solicitation within the meaning of the definition of broker in Section 3(a)(4) of the Securities Exchange Act of 1934,[3] whether or not there is transaction-based compensation. We recommend that these words be deleted, or that the SEC Staff issue a no-action letter under 3a4-1 under the Securities Exchange Act of 1934 to permit an investment adviser (or a Private Fund Adviser) to rely on that rule to offer the securities of a pooled investment vehicle that it advises without having to register as a broker-dealer, failing which there should be an interpretation that issuing such advertisement is not a solicitation under Section 3(a)(4) or Rule 3a4-1 and does not required registration with the SEC as a broker-dealer.

[1] Investment Advisers Act Release IA-5407, 84 F.R. 67518 (December 10, 2019).
[2] Our comments reflect the writer's experience gained in 38 years in the industry as a regulator, industry participant and consultant. This includes our involvement with non-U.S. and U.S. SEC registered investment advisers ("RIAs") and registrants to become RIAs in projects as varied as compliance programs, registrations, mock exams, examinations and annual reviews.
[3] See, e.g., "footnote 9, "Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers", Investment Advisers Act Release IA-3222, 76 F.R. 39646 (July 6, 2011).

We recommend that the Commission include within the scope of what is not advertisement a factual portfolio or account statement that does nothing more than state the composition of an account or a portfolio, valuations or fee calculations, account or portfolio activity and does not contain any quotations, materials, information or disclosure that would constitute advertising.

Retail persons and non-retail persons

We recommend against bifurcating aspects of the amended rule to apply to retail persons and non-retail persons. Already, there are too many definitions in use in the federal securities laws and the rules thereunder. Recent rulemaking activity, in particular, Form CRS, uses the term "retail investor" that does not match other defined terms. Here, the proposal uses the term "retail person". We query why there should be yet another new definition, inconsistent with a rule that has just come into effect and other definitions in use today. We also believe that a negative definition, defining a retail person as a person other than a non-retail person, unnecessarily complicates a field of already inconsistent and outdated definitions. For an investment adviser managing client assets in separately managed accounts and pooled investment vehicles, it presents a compliance nightmare in having to map out who can receive what when, what to be able to say and what records to keep. It will confuse prospects and employees of an investment adviser finding that some prospects or clients would fall under different definitions. When new definitions are introduced, the process of compliance becomes complicated, costs increase, multiple versions of a document are required and record keeping increases – creating more possibilities to get it wrong. We noted the issue of outdated and conflicting definitions in our comment letter on the Concept Release on Harmonization of Securities Offering Exemptions and we reiterate our concerns.

We note that Advisers Act Section 206(4) is silent on types of persons – it speaks to rulemaking to prevent an act, practice or course of business that is fraudulent, manipulative or deceptive. Other sub-sections of Section 206(4) use the terms "client" and "prospective client" but do not speak in terms of types of persons, clients or prospective clients. We believe that the amended advertising rule must apply equally to all recipients of advertising, regardless of type of person, and recommend not using definitions. We recommend no definitions in the adopted rule and that all provisions of the rule apply equally to prospects and clients, failing which the statutory authority for definitions should be spelled out clearly and existing definitions be used.

Compliance clearance

Advisers Act Rule 206(4)-7 requires that an investment adviser must adopt and implement written policies and procedures reasonably designed to prevent violations by it and its Supervised Persons of the Advisers Act and the rules thereunder. Today, advertising is reviewed and compliance cleared, not approved. Proposed paragraph (d), "Review and approval", has no place in a substantive rule. Also, elements of paragraph (d) are inconsistent with other provisions of the proposed amended rule. Rule 206(4)-7, the "Compliance Rule", is a powerful tool to enable supervisors, Compliance departments and Chief Compliance Officers to operate in a proper manner. Any rule that contains a review and approval requirement undermines Rule 206(4)-7, and if this trend continues other substantive rules might be in danger of being amended to add similar provisions. We most strongly recommend that paragraph (d) not be adopted and that, instead, the Commission or the Division of Investment Management issue an interpretation that an investment adviser's written policies and procedures include advertising review and approval controls, consistent with the letter and spirit of the Compliance Rule and Advisers Act Section 206(4).

Nomenclature and clarity

The words “fair and balanced” are used twice but not defined. We would recommend that clear guidance should be given as to what these words mean.

The words “… offers to provide promptly” in paragraph (c)(1)(i) places the burden of obtaining the schedule of fees and expenses on the recipient of the advertisement. We recommend that these words be eliminated.

For the same reason, we recommend that the words “… (or, if such person is a *non-retail person,* provides or offers to provide promptly)” in paragraph (c)(1)(v)(C) be eliminated.

Conclusion

We commend the Commission and the Staff for addressing the advertising rule and ensuring that it is modernized. We hope that our comments are taken on board. We would also ask that the SEC consider amending Exchange Act Rule 3a4-1 or grant no-action relief.

We are happy to meet with the Commissioners or the SEC Staff to discuss our comments.

For and on behalf of CompliGlobe Ltd.,

Mark Berman
Founder and CEO